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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051679
Party	Plaintiff DemetrioPapagni
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Submission	Motion for Summary Judgment
Filer's Name	Mark D. Miller
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Date	04/06/2010
Attachments	Motion_summary_judgment.pdf (46 pages)(2708436 bytes) Declaration_MDM.pdf (12 pages)(550531 bytes)

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7

8 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
9 TRADEMARK TRIAL AND APPEAL BOARD
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11	DEMETRIO PAPAGNI, an individual,)	Cancellation No. 92051679
12)	
	Petitioner)	In the matter of Registration No. 3,679,176
13)	For the mark FU JIN
	v.)	
14	EMPIRE GRAPE COMPANY, LLC,)	PETITIONER'S MOTION FOR
	a California Limited Liability Company,)	SUMMARY JUDGMENT AND
15)	PETITIONER'S MEMORANDUM OF
	Respondent.)	LAW IN SUPPORT OF PETITIONER'S
16)	MOTION FOR SUMMARY JUDGMENT
17)	

18 Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, and Rule 2.127(e) of the
19 Trademark Rules of Practice, Demetrio Papagni ("Petitioner"), by and through his attorneys,
20 hereby moves the Trademark Trial and Appeal Board for an order that grants Petitioner summary
21 judgment on Petitioner's claim that the Respondent did not use the mark in commerce as of the
22 filing date of the application and cancels the registration U.S. Registration No. 3,679,176.

23 As shown below, Empire Grape Company, LLC ("Respondent") had not used the mark
24 shown in U.S. Registration No. 3,679,176 ("the Registration") in United States commerce on or
25 in connection with the goods it identified in U.S. Application Serial No. 77/666,862 at the time
26 the Application was filed. Accordingly, Petitioner submits that the Trademark Trial and Appeal
27 Board should grant Petitioner's Motion for Summary Judgment on this claim for relief, as no
28 genuine issue of material fact exists for the Trademark Trial and Appeal Board to decide.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate in cases where the moving party establishes that there are no genuine issues of material fact which require resolution at trial, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) ("The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law."); *see also* T.T.A.B. Manual of Procedure ("TBMP") § 528.01; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). When appropriate, the Trademark Trial and Appeal Board does not hesitate to dispose of cases on summary judgment. *See* TBMP § 528.01. As shown below, summary judgment is appropriate in this proceeding, as no reasonable fact finder could decide Petitioner's claim for relief in Respondent's favor.

II. FACTUAL BACKGROUND

On February 10, 2009, Respondent filed U.S. Application Serial No. 77/666,862 for the mark FU JIN for use on wine under section 1(a) of the Lanham Act, 15 U.S.C. § 1051(a), based on actual use.¹ In support of Respondent's claim of actual use of the mark, Peterangelo Vallis, as a Member of Respondent, declared under penalty of perjury pursuant to 37 C.F.R. § 2.20 that Respondent had been using the mark in commerce since at least April 15, 1976, and provided a specimen of use, in the form of a wine label, which Registrant asserted was in use at the time the application was filed. On May 7, 2009, the Trademark Examiner issued an office action, in which the examiner found the specimen unacceptable, and required the submission of substitute specimens to proceed with the actual use application. Registrant responded to the office action on May 10, 2009, by submitting a substitute specimen consisting of a bottle of wine, ice bucket, and wine opener, and again declared under penalty of perjury pursuant to 37 C.F.R. § 2.20 that the mark was in use in commerce since at least April 15, 1976, and the substitute specimen was in use in commerce as of the date of filing the application. Based on such representations, the mark matured into Registration No. 3,679,176 on September 8, 2009.

¹ The file history for Registration No. 3,679,176 is automatically of record in this proceeding. 37 C.F.R. § 2.122(b)(1); TBMP § 528.05(a).

1 Petitioner filed an intent to use application for the mark FU JIN on wine on March 20,
2 2009, U.S. Application Serial No. 77/696,075. See Declaration of Mark D. Miller in Support of
3 Petitioner's Motion for Summary Judgment, ¶ 2, Ex. A. The prosecution of U.S. Application
4 Serial No. 77/696,075 as been suspended based on the potential likelihood of confusion with
5 Respondent's registration. See *Id.* ¶ 3, Ex. B.

6 On October 30, 2009, Petitioner filed a Petition for Cancellation against U.S. Registration
7 No. 3,679,176 on the grounds that the mark was not in use in commerce at the time the
8 application was filed, and that Respondent made false, material representations to the United
9 States Patent and Trademark Office in order to obtain the registration.

10 During the discovery period of the Cancellation proceeding, Petitioner engaged in
11 discovery. As a result of that discovery, Petitioner believes that Respondent's Registration is
12 void *ab initio* under Section 1(a) of the Lanham Act because Registrant unequivocally admits
13 that the mark was not in use in commerce in or on connection with the goods identified in U.S.
14 Registration No. 3,679,176 (i.e. "wine") at the time the application for registration was filed. See
15 Respondent's Answers to Petitioner's First Set of Request for Admissions annexed hereto as
16 Exhibit 1, Response Nos. 6-17, 25-33, 35-44, and 48.²

17 As shown below, Respondent was not using the mark FU JIN in commerce on or in
18 connection with wine when Respondent filed U.S. Application Serial No. 77/666,862 on
19 February 10, 2009. Respondent's Answers to Petitioner's First Set of Request for Admissions,
20 admit that Respondent was not selling or advertising wine under the mark FU JIN, and further
21 admit that Registrant did not create the specimens submitted in support of the allegations of use.

22 III. ARGUMENT

23 A. Section 1(a) of the Lanham Act Requires an Applicant to Provide a 24 Verified Statement That the Mark is in Use in Commerce and Provide Specimens Corroborating the Actual Use of the Mark.

25 An applicant who has applied to register his mark in the United States under Section 1(a),
26 claiming use of its trademark in commerce must, in its United States application, verify, in
27

28 ² The Request for Admissions is attached to this Brief as Exhibit 1 and the Respondent's Answers to the Request for Admissions are attached as Exhibit 2 to this Motion for Summary Judgment. In accordance with 37 C.F.R. § 2.127(e)(2) and TBMP § 528.05(c), Respondent's admissions form a part of the summary judgment record.

1 writing, that the mark is in use in United States commerce. 15 U.S.C. § 1051(a)(3)(C).
2 Furthermore, with regard to a trademark, the “use in commerce” requirement is met “when a
3 mark is (A) placed in any manner on the goods or their containers or the displays associated
4 therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such
5 placement impracticable, then on documents associated with the goods or their sale, and (B) the
6 goods are sold or transported in commerce...” 15 U.S.C. § 1127; *Aycock Engineering, Inc. v.*
7 *Airflite, Inc.*, 560 F.3d 1350, 1357, 90 U.S.P.Q.2d 1301 (Fed. Cir. 2009). The registration of a
8 mark that does not meet the use requirement is void ab initio. *Aycock Engineering, Inc.*, 560 F.3d
9 at 1357.

10 **B. Discovery Has Shown That Respondent Did Not Use the Mark Shown**
11 **in U.S. Application Serial No. 77/666,862 in United States Commerce**
At the Time of Filing.

12 In the present matter, U.S. Application Serial No. 77/666,862 was filed on February 10,
13 2009, thereby requiring Respondent to be using the mark in commerce as of that date. Despite
14 making such verified statements during the application process, Respondent’s Answers to
15 Petitioner’s First Set of Request of Admissions make it abundantly clear that Respondent had not
16 used the mark FU JIN at the time U.S. Application Serial No. 77/666,862 was filed.
17 Specifically, on March 4, 2010, Respondent admitted that it was not using the mark “FU JIN” on
18 wine at the time of filing U.S. Application Serial No. 77/666,862:

19 **REQUEST FOR ADMISSION NO. 6:**

20 Admit that as of February 10, 2009, EMPIRE was not using the words FU JIN on
21 wine.

22 **[ANSWER:]** *Admit*

23 **REQUEST FOR ADMISSION NO. 7:**

24 Admit that as of February 10, 2009, Peterangelo Vallis was aware that EMPIRE
25 was not then using the words FU JIN on wine.

26 **[ANSWER:]** *Admit*

27 **REQUEST FOR ADMISSION NO. 8:**

28 Admit that EMPIRE had not used the words FU JIN on wine at any time between
August 2002 and February 10, 2009.

[ANSWER:] *Admit (Ex. 2)*

///

Respondent further admitted that (1) it was not selling wine with the "FU JIN" mark at the time of filing U.S. Application Serial No. 77/666,862; and (2) it had not produced any labels or wine containers with the "FU JIN" mark at the time of filing U.S. Application Serial No. 77/666,862:

REQUEST FOR ADMISSION NO. 9:

Admit that as of February 10, 2009, EMPIRE was not selling wine with the words FU JIN on containers for the wine.

[ANSWER:] *Admit*

REQUEST FOR ADMISSION NO. 10:

Admit that between August 2002 and February 10, 2009, EMPIRE had not caused any final (non-sample) wine labels to be printed with the words FU JIN on them.

[ANSWER:] *Admit*

REQUEST FOR ADMISSION NO. 11:

Admit that EMPIRE had not sold any wine with the words FU JIN on labels for the wine at any time between August 2002 and February 10, 2009.

[ANSWER:] *Admit*

REQUEST FOR ADMISSION NO. 12:

Admit that between August 2002 and February 10, 2009, EMPIRE had not caused any wine containers to be created with the words FU JIN on them.

[ANSWER:] *Admit*

REQUEST FOR ADMISSION NO. 13:

Admit that between August 2002 and February 10, 2009, EMPIRE had not sold any wine with the words FU JIN on containers for the wine.

[ANSWER:] *Admit (Ex. 2)*

Respondent further admitted that it was not marketing or advertising wine with the "FU JIN" mark at the time of filing U.S. Application Serial No. 77/666,862:

REQUEST FOR ADMISSION NO. 14:

Admit that as of February 10, 2009, EMPIRE was not marketing wine using the words FU JIN.

[ANSWER:] *Admit*

REQUEST FOR ADMISSION NO. 15:

Admit that between August 2002 and February 10, 2009, EMPIRE was not marketing wine using the words FU JIN.

[ANSWER:] *Admit*

///

1 **REQUEST FOR ADMISSION NO. 16:**

2 Admit that as of February 10, 2009, EMPIRE was not advertising wine using the words FU JIN.

3 **[ANSWER:]** *Admit*

4 **REQUEST FOR ADMISSION NO. 17:**

5 Admit that between August 2002 and February 10, 2009, EMPIRE was not advertising wine using the words FU JIN.

6 **[ANSWER:]** *Admit (Ex. 2)*

7 In addition to the above admissions, Respondent admits that no licensee of Respondent
8 was using, selling, creating labels or containers, advertising, or promoting with the words "FU
9 JIN" for wine at the time of filing U.S. Application Serial No. 77/666,862. Ex. 2, Nos. 25-33.
10 Finally, Respondent admits that it did not create the specimens submitted with U.S. Application
11 Serial No. 77/666,862. *Id.*, Nos. 43-44, and 48.

12 Based on the above admissions, it is abundantly clear that Respondent was not using the
13 mark as contemplated under 15 U.S.C. §1127 at the time of filing U.S. Application Serial No.
14 77/666,862. At that time, and for the period of nearly seven years prior to filing, Respondent had
15 not created labels or containers with the mark "FU JIN." Ex. 2. Furthermore, at the time of filing,
16 and for the period of nearly seven years prior to filing, Respondent had not sold wine with the
17 mark "FU JIN." *Id.* Respondent's admissions make it abundantly clear that Respondent was not
18 using the mark in commerce, and therefore Registration No. 3,679,176 should be cancelled and
19 considered void ab initio. *See Aycock Engineering, Inc.*, 560 F.3d at 1357.

20 **IV. CONCLUSION**

21 As shown above, Respondent admits that it has not used the mark "FU JIN" on or in
22 connection with the goods identified in U.S. Application Serial No. 77/666,862 in United States
23 commerce when it applied to register the mark on February 10, 2009. As such, no genuine issue
24 of material fact exists for the Trademark Trial and Appeal Board to decide. Accordingly,
25 Petitioner respectfully requests that the Trademark Trial and Appeal Board grant Petitioner's

26 ///

27 ///


28 ///

1 Motion for Summary Judgment, and in such manner grant the Petition for Cancellation, and
2 cancel Respondent's U.S. Registration No. 3,679,176 based on the failure to meet the use in
3 commerce requirement of 15 U.S.C. § 1051(a).

4 Dated: April 6, 2010

Respectfully submitted,

KIMBLE, MacMICHAEL & UPTON
A Professional Corporation

7 By 

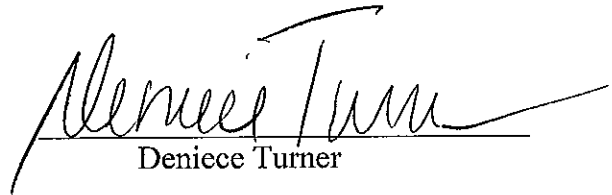
8 MARK D. MILLER
9 Attorneys for Petitioner,
10 DEMETRIO PAPAGNI
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND PETITIONER'S
MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY
JUDGMENT is being served on the Respondent via first class mail, postage prepaid, on April 6,
2010 in an envelope addressed as follows:

Empire Grape Company, LLC
Attn: Peterangelo Vallis
2549 W. Paul Ave.
Fresno, California 93711


Deniece Turner

1074401.00137704.000

Exhibit “1”

1 MARK D. MILLER CA Bar No. 116349
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10 Attorneys for Petitioner,
11 DEMETRIO PAPAGNI

12
13 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
14
15 TRADEMARK TRIAL AND APPEAL BOARD

16 * * *

17 DEMETRIO PAPAGNI, an individual,
18
19 Petitioner

20 v.

21 EMPIRE GRAPE COMPANY, LLC,
22 a California Limited Liability Company,
23
24 Respondent.

Cancellation No. 92051679

In the matter of Registration No. 3,679,176
For the mark **FU JIN**

**PETITIONER'S FIRST SET OF
REQUESTS FOR ADMISSIONS**

25 PROPOUNDING PARTY: DEMETRIO PAPAGNI

26 RESPONDING PARTY: EMPIRE GRAPE COMPANY, LLC

27 SET NUMBER: One (1)

28 Petitioner DEMETRIO PAPAGNI ("PAPAGNI") hereby requests that Respondent
EMPIRE GRAPE COMPANY, LLC. ("EMPIRE") admit the truthfulness of each of the facts set
forth below:

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1 **REQUESTS**

2 **REQUEST FOR ADMISSION NO. 1:**

3 Admit that EMPIRE, as Applicant, filed a trademark application for registration of the
4 words FU JIN for use on "wine" that was received by the U.S. Patent and Trademark Office
5 ("USPTO") on February 10, 2009 and assigned serial number 77/666,862 (hereafter "the FU JIN
6 Trademark Application").

7
8 **REQUEST FOR ADMISSION NO. 2:**

9 Admit the genuineness of the TEAS Plus Application for registration of the trademark
10 FU JIN, a copy of which is attached hereto as Exhibit A and incorporated herein by this
11 reference.

12
13 **REQUEST FOR ADMISSION NO. 3:**

14 Admit that the initial application document in the FU JIN Trademark Application
15 (Exhibit A) was electronically signed by Peterangelo Vallis as a Member of EMPIRE.

16
17 **REQUEST FOR ADMISSION NO. 4:**

18 Admit that the initial application document in the FU JIN Trademark Application
19 (Exhibit A) contains the following statement "the mark was first used at least as early as
20 04/15/1976, and first used in commerce at least as early as 04/15/1976, and is now in use in
21 such commerce."

22
23 **REQUEST FOR ADMISSION NO. 5:**

24 Admit that EMPIRE intended for the USPTO to rely on the statements referred to in
25 Request for Admission No. 4 in order to issue a registration for the mark FU JIN.

26
27 **REQUEST FOR ADMISSION NO. 6:**

28 Admit that as of February 10, 2009, EMPIRE was not using the words FU JIN on wine.

1 **REQUEST FOR ADMISSION NO. 7:**

2 Admit that as of February 10, 2009, Peterangelo Vallis was aware that EMPIRE was not
3 then using the words FU JIN on wine.

4
5 **REQUEST FOR ADMISSION NO. 8:**

6 Admit that EMPIRE had not used the words FU JIN on wine at any time between August
7 2002 and February 10, 2009.

8
9 **REQUEST FOR ADMISSION NO. 9:**

10 Admit that as of February 10, 2009, EMPIRE was not selling wine with the words FU
11 JIN on containers for the wine.

12
13 **REQUEST FOR ADMISSION NO. 10:**

14 Admit that between August 2002 and February 10, 2009, EMPIRE had not caused any
15 final (non-sample) wine labels to be printed with the words FU JIN on them.

16
17 **REQUEST FOR ADMISSION NO. 11:**

18 Admit that EMPIRE had not sold any wine with the words FU JIN on labels for the wine
19 at any time between August 2002 and February 10, 2009.

20
21 **REQUEST FOR ADMISSION NO. 12:**

22 Admit that between August 2002 and February 10, 2009, EMPIRE had not caused any
23 wine containers to be created with the words FU JIN on them.

24
25 **REQUEST FOR ADMISSION NO. 13:**

26 Admit that between August 2002 and February 10, 2009, EMPIRE had not sold any wine
27 with the words FU JIN on containers for the wine.

1 **REQUEST FOR ADMISSION NO. 14:**

2 Admit that as of February 10, 2009, EMPIRE was not marketing wine using the words
3 FU JIN.

4
5 **REQUEST FOR ADMISSION NO. 15:**

6 Admit that between August 2002 and February 10, 2009, EMPIRE was not marketing
7 wine using the words FU JIN.

8
9 **REQUEST FOR ADMISSION NO. 16:**

10 Admit that as of February 10, 2009, EMPIRE was not advertising wine using the words
11 FU JIN.

12
13 **REQUEST FOR ADMISSION NO. 17:**

14 Admit that between August 2002 and February 10, 2009, EMPIRE was not advertising
15 wine using the words FU JIN.

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17 **REQUEST FOR ADMISSION NO. 18:**

18 Admit that as of February 10, 2009, EMPIRE was not promoting wine using the words
19 FU JIN.

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21 **REQUEST FOR ADMISSION NO. 19:**

22 Admit that between August 2002 and February 10, 2009, EMPIRE was not promoting
23 wine using the words FU JIN.

24
25 **REQUEST FOR ADMISSION NO. 20:**

26 Admit that Papagni Vineyards, Inc. has not sold wine under the FU JIN label since at
27 least 2004.

1 **REQUEST FOR ADMISSION NO. 21:**

2 Admit that Papagni Vineyards, Inc. was suspended as a California corporation prior to
3 February 10, 2009.

4
5 **REQUEST FOR ADMISSION NO. 22:**

6 Admit that Papagni Vineyards, Inc. never transferred any trademark rights in the words
7 FU JIN for use on wine to EMPIRE.

8
9 **REQUEST FOR ADMISSION NO. 23:**

10 Admit that Papagni Vineyards, Inc. is not a related company to EMPIRE.

11
12 **REQUEST FOR ADMISSION NO. 24:**

13 Admit that Papagni Vineyards, Inc. is not a predecessor in interest to EMPIRE.

14
15 **REQUEST FOR ADMISSION NO. 25:**

16 Admit that as of February 10, 2009, no licensee of EMPIRE was using the words FU JIN
17 on wine.

18
19 **REQUEST FOR ADMISSION NO. 26:**

20 Admit that no licensee of EMPIRE had used the words FU JIN on wine at any time
21 between August 2002 and February 10, 2009.

22
23 **REQUEST FOR ADMISSION NO. 27:**

24 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE was
25 selling wine with the words FU JIN on containers for the wine.

1 **REQUEST FOR ADMISSION NO. 28:**

2 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE had
3 caused any final (non-sample) wine labels to be printed with the words FU JIN on them.
4

5 **REQUEST FOR ADMISSION NO. 29:**

6 Admit that no licensee of EMPIRE had sold any wine with the words FU JIN on labels
7 for the wine at any time between August 2002 and February 10, 2009.
8

9 **REQUEST FOR ADMISSION NO. 30:**

10 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE had
11 caused any wine containers to be created with the words FU JIN on them.
12

13 **REQUEST FOR ADMISSION NO. 31:**

14 Admit that no licensee of EMPIRE had sold any wine with the words FU JIN on
15 containers for the wine at any time between August 2002 and February 10, 2009.
16

17 **REQUEST FOR ADMISSION NO. 32:**

18 Admit that as of February 10, 2009, no licensee of EMPIRE was marketing wine using
19 the words FU JIN.
20

21 **REQUEST FOR ADMISSION NO. 33:**

22 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE was
23 marketing wine using the words FU JIN.
24

25 **REQUEST FOR ADMISSION NO. 34:**

26 Admit that as of February 10, 2009, no licensee of EMPIRE was advertising wine using
27 the words FU JIN.
28

1 **REQUEST FOR ADMISSION NO. 35:**

2 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE was
3 advertising wine using the words FU JIN.

4
5 **REQUEST FOR ADMISSION NO. 36:**

6 Admit that as of February 10, 2009, no licensee of EMPIRE was promoting wine using
7 the words FU JIN.

8
9 **REQUEST FOR ADMISSION NO. 37:**

10 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE was
11 promoting wine using the words FU JIN.

12
13 **REQUEST FOR ADMISSION NO. 38:**

14 Admit the genuineness of the Response to Office Action dated May 10, 2009 filed in the
15 FU JIN Trademark Application, a copy of which is attached hereto as Exhibit B and incorporated
16 herein by this reference.

17
18 **REQUEST FOR ADMISSION NO. 39:**

19 Admit that the Response to Office Action dated May 10, 2009 filed in the FU JIN
20 Trademark Application (Exhibit B) was electronically signed by Peterangelo Vallis as a Member
21 of EMPIRE.

22
23 **REQUEST FOR ADMISSION NO. 40:**

24 Admit that the Response to Office Action dated May 10, 2009 filed in the FU JIN
25 Trademark Application (Exhibit B) contains the following statement "Applicant hereby submits
26 a new specimen for Class 033. The specimen(s) submitted consists of The specimen consists of
27 a bottle of Fu Jin wine. The bottle is inside of Fu Jin labeled ice bucket (promotional item).
28 Also included in the picture is a Fu Jin wine opener (also for promotional purposes). For an

1 application based on 1(a), Use in Commerce, 'The substitute specimen(s) was in use in
2 commerce as of the filing date of the application.'"

3
4 **REQUEST FOR ADMISSION NO. 41:**

5 Admit that EMPIRE intended for the USPTO to rely on the statements referred to in
6 Request for Admission No. 39 in order to issue a registration for the mark FU JIN.

7
8 **REQUEST FOR ADMISSION NO. 42:**

9 Admit the genuineness of the photographic specimen filed with the Response to Office
10 Action dated May 10, 2009 filed in the FU JIN Trademark Application, a copy of which is
11 attached hereto as Exhibit C and incorporated herein by this reference.

12
13 **REQUEST FOR ADMISSION NO. 43:**

14 Admit that the FU JIN label on the wine bottle depicted in the photographic specimen
15 filed with the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
16 Application (Exhibit C) was not caused to be created by EMPIRE.

17
18 **REQUEST FOR ADMISSION NO. 44:**

19 Admit that the FU JIN label on the wine bottle depicted in the photographic specimen
20 filed with the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
21 Application (Exhibit C) was created by Papagni Vineyards, Inc.

22
23 **REQUEST FOR ADMISSION NO. 45:**

24 Admit that the FU JIN label on the wine bottle depicted in the photographic specimen
25 filed with the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
26 Application (Exhibit C) was created prior to August 2002.

1 **REQUEST FOR ADMISSION NO. 46:**

2 Admit that as of February 10, 2009, Peterangelo Vallis was aware that the FU JIN label
3 on the wine bottle depicted in the photographic specimen filed with the Response to Office
4 Action dated May 10, 2009 filed in the FU JIN Trademark Application (Exhibit C) had been
5 created prior to August 2002.

6
7 **REQUEST FOR ADMISSION NO. 47:**

8 Admit that the FU JIN label on the wine bottle depicted in the photographic specimen
9 filed with the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
10 Application (Exhibit C) was saved by Peterangelo Vallis in the early 2000's.

11
12 **REQUEST FOR ADMISSION NO. 48:**

13 Admit that the FU JIN bucket and opener depicted in the photographic specimen filed
14 with the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
15 Application (Exhibit C) was not caused to be created by EMPIRE.

16
17 **REQUEST FOR ADMISSION NO. 49:**

18 Admit that the FU JIN bucket and opener depicted in the photographic specimen filed
19 with the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
20 Application (Exhibit C) was created by Papagni Vineyards, Inc.

21
22 **REQUEST FOR ADMISSION NO. 50:**

23 Admit that the FU JIN bucket and opener depicted in the photographic specimen filed
24 with the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
25 Application (Exhibit C) was created prior to August 2002.

1 **REQUEST FOR ADMISSION NO. 51:**

2 Admit that the FU JIN bucket and opener depicted in the photographic specimen filed
3 with the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
4 Application (Exhibit C) was saved by Peterangelo Vallis in the early 2000's.
5

6 **REQUEST FOR ADMISSION NO. 52:**

7 Admit that EMPIRE was formed as a California limited liability company in August
8 2002.
9
10
11

12 Dated: February __, 2010

KIMBLE, MacMICHAEL & UPTON
A Professional Corporation

14 By


MARK D. MILLER,
Attorneys for Petitioner,
DEMETRIO PAPAGNI

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Empire Grape Company, LLC
Attn: Peterangelo Vallis
2549 W. Paul Ave.
Fresno, California 93711

Deniece Turner
Deniece Turner

Exhibit “A”

Trademark/Service Mark Application, Principal Register

TEAS Plus Application

Serial Number: 77666862

Filing Date: 02/10/2009

NOTE: Data fields with the * are mandatory under TEAS Plus. The wording "(if applicable)" appears where the field is only mandatory under the facts of the particular application.

The table below presents the data as entered.

Input Field	Entered
TEAS Plus	YES
MARK INFORMATION	
*MARK	<u>Fu Jin</u>
*STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	Fu Jin
*MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
REGISTER	Principal
APPLICANT INFORMATION	
*OWNER OF MARK	Empire Grape Company, LLC
*STREET	2540 W. Paul Avenue
INTERNAL ADDRESS	2540 W. Paul
*CITY	Fresno
*STATE (Required for U.S. applicants)	California
*COUNTRY	United States
*ZIP/POSTAL CODE	93711

EXHIBIT A

(Required for U.S. applicants only)	
PHONE	559-905-7748
FAX	559-897-4012
EMAIL ADDRESS	pvalis@gmail.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
LEGAL ENTITY INFORMATION	
*TYPE	LIMITED LIABILITY COMPANY
* STATE/COUNTRY WHERE LEGALLY ORGANIZED	California
GOODS AND/OR SERVICES AND BASIS INFORMATION	
*INTERNATIONAL CLASS	033
FIRST USE ANYWHERE DATE	At least as early as 04/15/1976
FIRST USE IN COMMERCE DATE	At least as early as 04/15/1976
*IDENTIFICATION	Wine
*FILING BASIS	SECTION 1(a)
FIRST USE ANYWHERE DATE	At least as early as 04/15/1976
FIRST USE IN COMMERCE DATE	At least as early as 04/15/1976
SPECIMEN FILE NAME(S)	\\TICRS\EXPORT6\IMAGEOUT6 \\776\668\77666862\xml1\FT K0003.JPG
SPECIMEN DESCRIPTION	Label
ADDITIONAL STATEMENTS INFORMATION	
*TRANSLATION (if applicable)	
*TRANSLITERATION (if applicable)	
*CLAIMED PRIOR REGISTRATION (if applicable)	
* CONSENT (NAME/ LIKENESS) (if applicable)	
* CONCURRENT USE CLAIM (if applicable)	
CORRESPONDENCE INFORMATION	

EXHIBIT A

*NAME	Peterangelo Vallis
FIRM NAME	Empire Grape Company, LLC
*STREET	2540 W. Paul Avenue
INTERNAL ADDRESS	2540 W. Paul
*CITY	Fresno
*STATE (Required for U.S. applicants)	California
*COUNTRY	United States
*ZIP/POSTAL CODE	93711
PHONE	559-905-7748
FAX	559-897-4012
*EMAIL ADDRESS	pvalis@gmail.com
*AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	275
*TOTAL FEE PAID	275
SIGNATURE INFORMATION	
* SIGNATURE	/Peterangelo Vallis/
* SIGNATORY'S NAME	Peterangelo Vallis
* SIGNATORY'S POSITION	Member
* DATE SIGNED	02/09/2009

Trademark/Service Mark Application, Principal Register

EXHIBIT A

TEAS Plus Application

Serial Number: 77666862

Filing Date: 02/10/2009

To the Commissioner for Trademarks:

MARK: Fu Jin (Standard Characters, see mark)

The literal element of the mark consists of Fu Jin.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Empire Grape Company, LLC, a limited liability company legally organized under the laws of California, having an address of

2540 W. Paul,

2540 W. Paul Avenue

Fresno, California 93711

United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.

For specific filing basis information for each item, you must view the display within the Input Table.

International Class 033: Wine

Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, or the applicant's predecessor in interest used the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended.

In International Class 033, the mark was first used at least as early as 04/15/1976, and first used in commerce at least as early as 04/15/1976, and is now in use in such commerce. The applicant is submitting one specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) Label.

Specimen File1

Correspondence Information: Peterangelo Vallis

2540 W. Paul

2540 W. Paul Avenue

Fresno, California 93711

559-905-7748(phone)

559-897-4012(fax)

pvalis@gmail.com (authorized)

A fee payment in the amount of \$275 has been submitted with the application, representing payment for 1 class(es).

Declaration

EXHIBIT A

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /Peterangelo Vallis/ Date Signed: 02/09/2009
Signatory's Name: Peterangelo Vallis
Signatory's Position: Member

RAM Sale Number: 5564
RAM Accounting Date: 02/10/2009

Serial Number: 77666862
Internet Transmission Date: Tue Feb 10 00:33:17 EST 2009
TEAS Stamp: USPTO/FTK-69.232.174.219-200902100033179
27682-77666862-44055a5654964ce1dcf5c22a1
0bdd4946b-CC-5564-20090209235539770582

EXHIBIT A

Fu Jin

錦
繡
前
程

Fu Jin
酒

Sample Sample Sample S

富
貴
榮
華

Exhibit “B”

Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77666862
LAW OFFICE ASSIGNED	LAW OFFICE 110
MARK SECTION (no change)	
GOODS AND/OR SERVICES SECTION (current)	
INTERNATIONAL CLASS	033
DESCRIPTION	Wine
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 04/15/1976
FIRST USE IN COMMERCE DATE	At least as early as 04/15/1976
GOODS AND/OR SERVICES SECTION (proposed)	
INTERNATIONAL CLASS	033
DESCRIPTION	Wine
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 04/15/1976
FIRST USE IN COMMERCE DATE	At least as early as 04/15/1976
STATEMENT TYPE	"The substitute specimen(s) was in use in commerce as of the filing date of the application."
SPECIMEN FILE NAME(S)	\\TICRS\EXPORT6\IMAGEOUT6 \\776\668\77666862\xml6\RO A0002.JPG
SPECIMEN DESCRIPTION	The specimen consists of a bottle of Fu Jin wine. The bottle is inside of Fu Jin labeled ice bucket (promotional item). Also included in the picture is a Fu Jin wine opener (also for promotional purposes).
ADDITIONAL STATEMENTS SECTION	
TRANSLATION	The English translation of Fu Jin in the mark is Eternal

EXHIBIT B

	Happiness.
SIGNATURE SECTION	
DECLARATION SIGNATURE	/Peterangelo Vallis/
SIGNATORY'S NAME	Peterangelo Vallis
SIGNATORY'S POSITION	Member
DATE SIGNED	05/10/2009
RESPONSE SIGNATURE	/Peterangelo Vallis/
SIGNATORY'S NAME	Peterangelo Vallis
SIGNATORY'S POSITION	Member
DATE SIGNED	05/10/2009
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Sun May 10 23:16:50 EDT 2009
TEAS STAMP	USPTO/ROA-68.127.89.183-2 0090510231650569731-77666 862-43043675e1bec67c14569 c46cdd6cb3ae-N/A-N/A-2009 0510224609783856

PTO Form 1857 (Rev 9/2005)
OMB No. 0651-0050 (Exp. 04/2009)

Response to Office Action

To the Commissioner for Trademarks:

Application serial no. 77666862 has been amended as follows:

CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 033 for Wine

Original Filing Basis:

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 04/15/1976 and first used in commerce at least as early as 04/15/1976, and is now in use in

EXHIBIT B

such commerce.

Proposed: Class 033 for Wine

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 04/15/1976 and first used in commerce at least as early as 04/15/1976, and is now in use in such commerce.

Applicant hereby submits a new specimen for Class 033. The specimen(s) submitted consists of The specimen consists of a bottle of Fu Jin wine. The bottle is inside of Fu Jin labeled ice bucket (promotional item). Also included in the picture is a Fu Jin wine opener (also for promotional purposes)..

For an application based on 1(a), Use in Commerce, "The substitute specimen(s) was in use in commerce as of the filing date of the application."

Specimen File1

ADDITIONAL STATEMENTS

Translation

The English translation of Fu Jin in the mark is Eternal Happiness.

SIGNATURE(S)

Declaration Signature

If the applicant is seeking registration under Section 1(b) and/or Section 44 of the Trademark Act, the applicant has had a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. 37 C.F.R. Secs. 2.34(a)(2)(i); 2.34 (a)(3)(i); and 2.34(a)(4)(ii); and/or the applicant has had a bona fide intention to exercise legitimate control over the use of the mark in commerce by its members. 37 C.F. R. Sec. 2.44. If the applicant is seeking registration under Section 1(a) of the Trademark Act, the mark was in use in commerce on or in connection with the goods or services listed in the application as of the application filing date. 37 C.F.R. Secs. 2.34(a)(1)(i); and/or the applicant has exercised legitimate control over the use of the mark in commerce by its members. 37 C.F.R. Sec. 244. The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. §1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; that if the original application was submitted unsigned, that all statements in the original application and this submission made of the declaration signer's knowledge are true; and all statements in the original application and this submission made on information and belief are believed to be true.

Signature: /Peterangelo Vallis/ Date: 05/10/2009

Signatory's Name: Peterangelo Vallis

Signatory's Position: Member

EXHIBIT B

Response Signature

Signature: /Peterangelo Vallis/ Date: 05/10/2009

Signatory's Name: Peterangelo Vallis

Signatory's Position: Member

The signatory has confirmed that he/she is not represented by either an authorized attorney or Canadian attorney/agent, and that he/she is either (1) the applicant or (2) a person(s) with legal authority to bind the applicant; and if an authorized U.S. attorney or Canadian attorney/agent previously represented him/her in this matter, either he/she has filed a signed revocation of power of attorney with the USPTO or the USPTO has granted the request of his/her prior representative to withdraw.

Serial Number: 77666862

Internet Transmission Date: Sun May 10 23:16:50 EDT 2009

TEAS Stamp: USPTO/ROA-68.127.89.183-2009051023165056

9731-77666862-43043675e1bec67c14569c46cd

d6cb3ae-N/A-N/A-20090510224609783856

EXHIBIT B

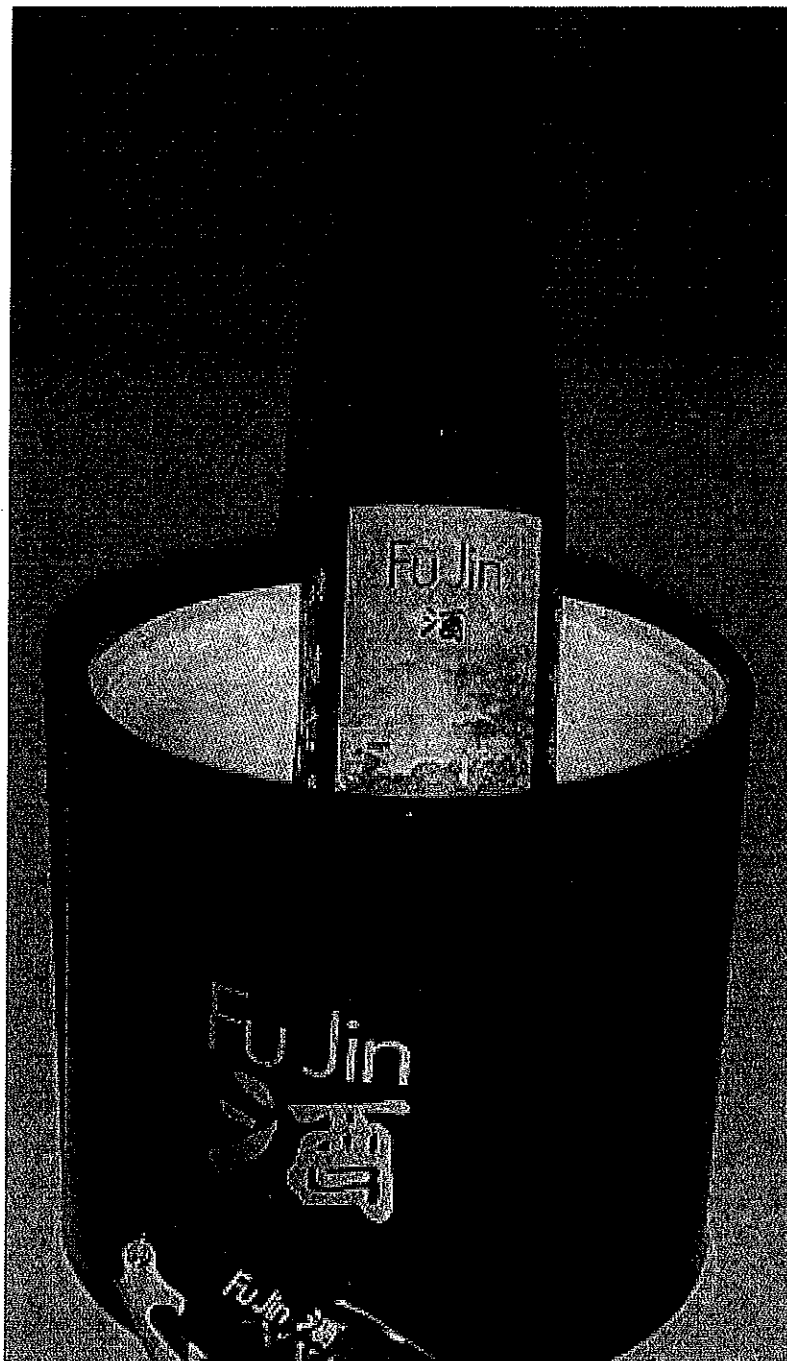


EXHIBIT B

Exhibit “C”

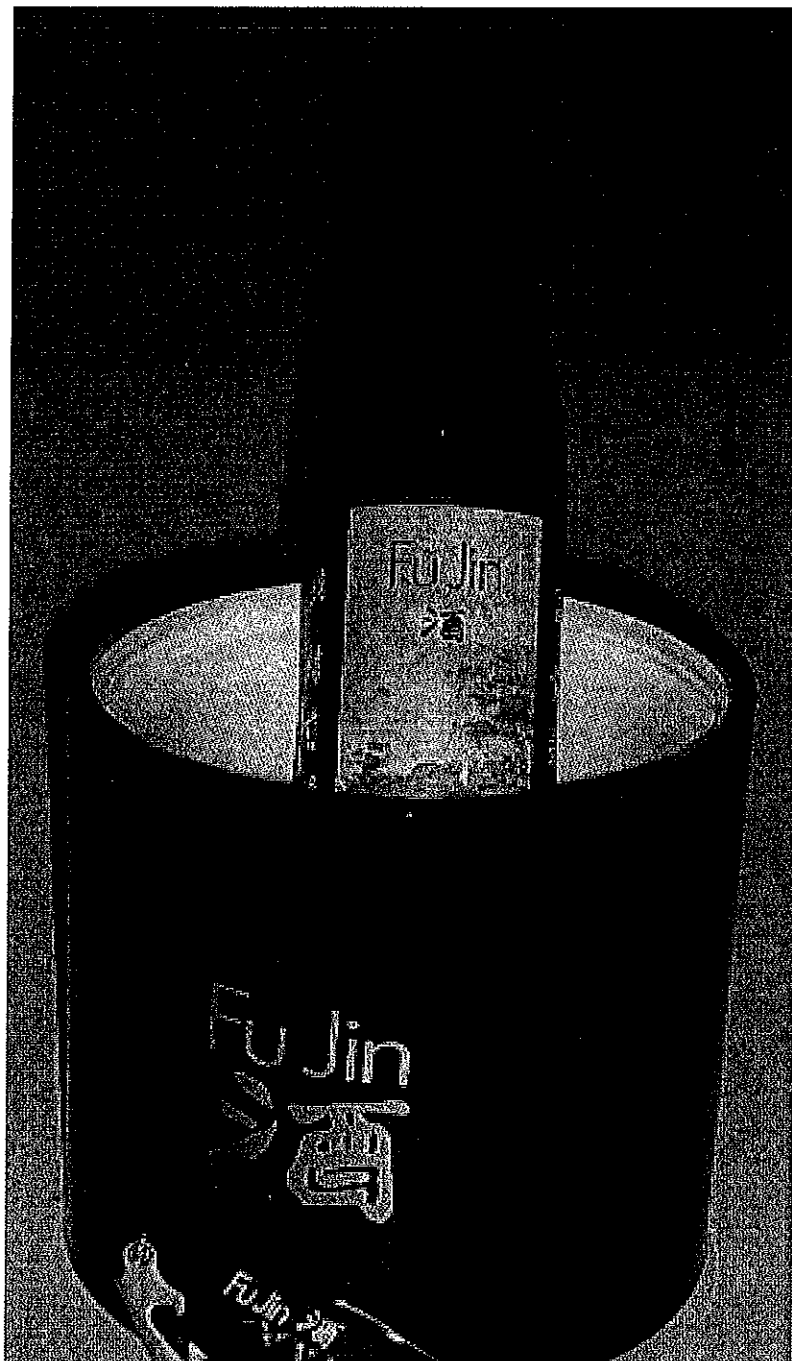


EXHIBIT C

Exhibit “2”

1 **EMPIRE GRAPE COMPANY, LLC**
2 **2540 West Paul**
3 **Fresno, California 93711**
4 **(559) 905- 7748**

5 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE**
6 **TRADEMARK TRIAL AND APPEAL BOARD**

7 **aΩa**

8
9 **DEMETRIO PAPAGNI, an individual,**) **Cancellation No. 92051679**
10 **Petitioner,**)
11 **v.**) **In the matter of Registration No. 3,679,176**
12 **EMPIRE GRAPE COMPANY, LLC,**) **For the mark FU JIN**
13 **a California Limited Liability Company,**) **RESPONDENT'S ANSWERS TO**
14 **Respondent.**) **PETITIONER'S FIRST SET OF**
15) **REQUESTS FOR ADMISSIONS**

16 **aΩa**

17 **PROPOUNDING PARTY: DEMETRIO PAPAGNI**
18 **RESPONDING PARTY: EMPIRE GRAPE COMPANY, LLC**
19 **SET NUMBER: ONE(1)**

20 **REQUEST FOR ADMISSION NO.1:**

21 Admit that EMPIRE, as Applicant, filed a trademark application for registration of the words FU JIN for
22 use on "wine" that was received by the U.S. Patent and Trademark Office ("USPTO") on February 10, 2009 and
23 assigned serial number 77/666,862 (hereafter "the FU JIN Trademark Application").

24 *Admit*

25 **REQUEST FOR ADMISSION NO.2:**

26 Admit the genuineness of the TEAS Plus Application for registration of the trademark FU JIN, a copy
27 of which is attached hereto as Exhibit A and incorporated herein by this reference.

28 *Admit*

29 **REQUEST FOR ADMISSION NO.3:**

Admit that the initial application document in the FU JIN Trademark Application (Exhibit A) was
electronically signed by Peterangelo Vallis as a Member of EMPIRE.

Admit

1 **REQUEST FOR ADMISSION NO.4:**

2 Admit that the initial application document in the FU JIN Trademark Application (Exhibit A) contains
3 the following statement "the mark was first used at least as early as 04/15/1976, and first used in commerce at least as
4 early as 04/15/1976, and is now in use in such commerce."

5 *Admit*

6 **REQUEST FOR ADMISSION NO.5:**

7 Admit that EMPIRE intended for the USPTO to rely on the statements referred to in Request for
8 Admission No. 4 in order to issue a registration for the mark FU JIN.

9 *Admit*

10 **REQUEST FOR ADMISSION NO.6:**

11 Admit that as of February 10, 2009, EMPIRE was not using the words FU JIN on wine.

12 *Admit*

13 **REQUEST FOR ADMISSION NO.7:**

14 Admit that as of February 10, 2009, Peterangelo Vallis was aware that EMPIRE was not then using the
15 words FU JIN on wine.

16 *Admit*

17 **REQUEST FOR ADMISSION NO.8:**

18 Admit that EMPIRE had not used the words FU JIN on wine at any time between August 2002 and
19 February 10, 2009.

20 *Admit*

21 **REQUEST FOR ADMISSION NO.9:**

22 Admit that as of February 10, 2009, EMPIRE was not selling wine with the words FU JIN on
23 containers for the wine.

24 *Admit*

25 **REQUEST FOR ADMISSION NO.10:**

26 Admit that between August 2002 and February 10, 2009, EMPIRE had not caused any final (non-
27 sample) wine labels to be printed with the words FU JIN on them.

28 *Admit*

29 **REQUEST FOR ADMISSION NO.11:**

Admit that EMPIRE had not sold any wine with the words FU JIN on labels for the wine at any time
between August 2002 and February 10, 2009.

Admit

1 **REQUEST FOR ADMISSION NO.12:**

2 Admit that between August 2002 and February 10, 2009, EMPIRE had not caused any wine
3 containers to be created with the words FU JIN on them.

4 *Admit*

5 **REQUEST FOR ADMISSION NO.13:**

6 Admit that between August 2002 and February 10, 2009, EMPIRE had not sold any wine with the
7 words FU JIN on containers for the wine.

8 *Admit*

9 **REQUEST FOR ADMISSION NO.14:**

10 Admit that as of February 10, 2009, EMPIRE was not marketing wine using the words FU JIN.

11 *Admit*

12 **REQUEST FOR ADMISSION NO.15:**

13 Admit that between August 2002 and February 10, 2009, EMPIRE was not marketing wine using the
14 words FU JIN.

15 *Admit*

16 **REQUEST FOR ADMISSION NO.16:**

17 Admit that as of February 10, 2009, EMPIRE was not advertising wine using the words FU JIN.

18 *Admit*

19 **REQUEST FOR ADMISSION NO.17:**

20 Admit that between August 2007 and February 10, 2009, EMPIRE was not advertising wine using the
21 words FU JIN.

22 *Admit*

23 **REQUEST FOR ADMISSION NO.18:**

24 Admit that as of February 10, 2009, EMPIRE was not promoting wine using the words FU JIN.

25 *Deny*

26 **REQUEST FOR ADMISSION NO.19:**

27 Admit that between August 2002 and February 10, 2009, EMPIRE was not promoting wine using the
28 words FU JIN.

29 *Deny*

REQUEST FOR ADMISSION NO.20:

Admit that Papagni Vineyards, Inc. has not sold wine under the FU JIN label since at least 2004.

1 *Respondent lacks sufficient information or knowledge of the matter involved in the*
2 *request and therefore denies.*

3 **REQUEST FOR ADMISSION NO.21:**

4 Admit that Papagni Vineyards, Inc. was suspended as a California corporation prior to February 10,
5 2009.

6 *Respondent lacks sufficient information or knowledge of the matter involved in the*
7 *request and therefore denies.*

8 **REQUEST FOR ADMISSION NO.22:**

9 Admit that Papagni Vineyards, Inc. never transferred any trademark rights in the words FU JIN for use
10 on wine to EMPIRE.

11 *Admit*

12 **REQUEST FOR ADMISSION NO.23:**

13 Admit that Papagni Vineyards, Inc. is not a related company to EMPIRE.

14 *Admit*

15 **REQUEST FOR ADMISSION NO.24:**

16 Admit that Papagni Vineyards, Inc. is not a predecessor in interest to EMPIRE.

17 *Admit*

18 **REQUEST FOR ADMISSION NO.25:**

19 Admit that as of February 10, 2009, no licensee of EMPIRE was using the words FU JIN on wine.

20 *Admit*

21 **REQUEST FOR ADMISSION NO.26:**

22 Admit that no licensee of EMPIRE had used the words FU JIN on wine at any time between August
23 2002 and February 10, 2009.

24 *Admit*

25 **REQUEST FOR ADMISSION NO.27:**

26 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE was selling wine
27 with the words FU JIN on containers for the wine.

28 *Admit*

29 **REQUEST FOR ADMISSION NO.28:**

Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE had caused any final
(non-sample) wine labels to be printed with the words FU JIN on them.

Admit

1 **REQUEST FOR ADMISSION NO.29:**

2 Admit that no licensee of EMPIRE had sold any wine with the words FU JIN on labels for the wine at
3 any time between August 2002 and February 10, 2009.

4 *Admit*

5 **REQUEST FOR ADMISSION NO.30:**

6 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE had caused any wine
7 containers to be created with the words FU JIN on them.

8 *Admit*

9 **REQUEST FOR ADMISSION NO.31:**

10 Admit that no licensee of EMPIRE had sold any wine with the words FU JIN on containers for the
11 wine at any time between August 2002 and February 10, 2009.

12 *Admit*

13 **REQUEST FOR ADMISSION NO.32:**

14 Admit that as of February 10, 2009, no licensee of EMPIRE was marketing wine using the words FU
15 JIN.

16 *Admit*

17 **REQUEST FOR ADMISSION NO.33:**

18 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE was marketing wine
19 using the words FU JIN.

20 *Admit*

21 **REQUEST FOR ADMISSION NO.34:**

22 Admit that Papagni Vineyards, Inc. has not sold wine under the FU JIN label since at least 2004.

23 *Admit*

24 **REQUEST FOR ADMISSION NO.35:**

25 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE was advertising
26 wine using the words FU JIN.

27 *Admit*

28 **REQUEST FOR ADMISSION NO.36:**

29 Admit that as of February 10, 2009, no licensee of EMPIRE was promoting wine using the words FU
JIN.

Admit

1 **REQUEST FOR ADMISSION NO.37:**

2 Admit that between August 2002 and February 10, 2009, no licensee of EMPIRE was promoting wine
3 using the words FU JIN.

4 *Admit*

5 **REQUEST FOR ADMISSION NO.38:**

6 Admit the genuineness of the Response to Office Action dated May 10, 2009 filed in the FU JIN
7 Trademark Application, a copy of which is attached hereto as Exhibit B and incorporated herein by this reference.

8 *Admit*

9 **REQUEST FOR ADMISSION NO.39:**

10 Admit that the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
11 Application (Exhibit B) was electronically signed by Peterangelo Vallis as a Member of EMPIRE.

12 *Admit*

13 **REQUEST FOR ADMISSION NO.40:**

14 Admit that the Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark
15 Application (Exhibit B) contains the following statement "Applicant hereby submits a new specimen for Class 033.
16 The specimen(s) submitted consists of The specimen consists of a bottle of Fu Jin wine. The bottle is inside of Fu Jin
17 labeled ice bucket (personal item). Also included in the picture is a Fu Jin wine opener (also for promotional
18 purposes). For an application based on 1(a), Use in Commerce, The substitute specimen(s) was in use in commerce
19 as of the filing dated of the application."

20 *Admit*

21 **REQUEST FOR ADMISSION NO.41:**

22 Admit that EMPIRE intended for the USPTO to rely on the statements referred to in Request for
23 Admission No. 39 in order to issue a registration for the mark FU JIN.

24 *Admit*

25 **REQUEST FOR ADMISSION NO.42:**

26 Admit the genuineness of the photographic specimen filed with the Response to Office Action dated
27 May 10, 2009 filed in the FU JIN Trademark Application, a copy of which is attached hereto as Exhibit C and
28 incorporated herein by this reference.

29 *Admit*

REQUEST FOR ADMISSION NO.43:

Admit that the FU JIN label on the wine bottle depicted in the photographic specimen filed with the
Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark Application (Exhibit C) was not
caused to be created by EMPIRE.

Admit

1 **REQUEST FOR ADMISSION NO.44:**

2 Admit that the FU JIN label on the wine bottle depicted in the photographic specimen filed with the
3 Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark Application (Exhibit C) was created by
4 Papagni Vineyards, Inc.

5 *Admit*

6 **REQUEST FOR ADMISSION NO.45:**

7 Admit that the FU JIN label on the wine bottle depicted in the photographic specimen filed with the
8 Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark Application (Exhibit C) was created
9 prior to August 2002.

10 *Respondent lacks sufficient information or knowledge of the matter involved in the*
11 *request and therefore denies.*

12 **REQUEST FOR ADMISSION NO.46:**

13 Admit that as of February 10, 2009, Peterangelo Vallis was aware that the FU JIN label on the wine
14 bottle depicted in the photographic specimen filed with the Response to Office Action dated May 10, 2009 filed in
15 the FU JIN Trademark Application (Exhibit C) had been created prior to August 2002.

16 *Respondent lacks sufficient information or knowledge of the matter involved in the*
17 *request and therefore denies.*

18 **REQUEST FOR ADMISSION NO.47:**

19 Admit that the FU JIN label on the wine bottle depicted in the photographic specimen filed with the
20 Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark Application (Exhibit C) was saved by
21 Peterangelo Vallis in the early 2000's.

22 *Deny*

23 **REQUEST FOR ADMISSION NO.48:**

24 Admit that the FU JIN bucket and opener depicted in the photographic specimen filed with the
25 Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark Application (Exhibit C) was not
26 caused to be created by EMPIRE.

27 *Admit*

28 **REQUEST FOR ADMISSION NO.49:**

29 Admit that the FU JIN bucket and opener depicted in the photographic specimen filed with the
Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark Application (Exhibit C) was created by
Papagni Vineyards, Inc.

Respondent lacks sufficient information or knowledge of the matter involved in the
request and therefore denies.

1 **REQUEST FOR ADMISSION NO.50:**

2 Admit that the FU JIN bucket and opener depicted in the photographic specimen filed with the
3 Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark Application (Exhibit C) was created
4 prior to August 2002.

5 *Respondent lacks sufficient information or knowledge of the matter involved in the*
6 *request and therefore denies.*

7 **REQUEST FOR ADMISSION NO.51:**

8 Admit that the FU JIN bucket and opener depicted in the photographic specimen filed with the
9 Response to Office Action dated May 10, 2009 filed in the FU JIN Trademark Application (Exhibit C) was saved by
10 Peterangelo Vallis in the early 2000's.

11 *Deny but admit that the FU JIN bucket and opener depicted in the photographic*
12 *specimen were given to Peterangelo Vallis for the express purpose of promoting FU JIN.*

13 **REQUEST FOR ADMISSION NO.52:**


14 Admit that EMPIRE was formed as a California limited liability company in August 2002.

15 *Admit*

16 I declare under penalty of perjury according to the laws of the State of California the foregoing is true and correct.

17 DATED: March 3, 2010

18 Empire Grape Company, LLC
19 by

20 
21 Peterangelo Vallis

1
2
3 PROOF OF SERVICE BY MAIL
4 STATE OF CALIFORNIA, COUNTY OF FRESNO
5

6 I am a resident or employed in the Fresno County ; I am over the age of eighteen (18) years
7 and not a party to this action; and my business address is:

8 1625 Simpson Avenue, Kingsburg, California, 93631.

9 On March 4, 2010 I served the **"RESPONDENT'S ANSWERS TO PETITIONER'S FIRST SET**
10 **OF REQUESTS FOR ADMISSIONS"** dated March 3, 2010, to the interested parties in this
11 action, by placing a true copy in a sealed envelope with postage thereon fully prepaid, in the
12 United States mail at Fresno, California, addressed as follows:

13 Mark D. Miller, Esq.
14 Kimble, MacMichael & Upton
15 5260 N. Palm Avenue, Suite 221
16 Fresno, California 93704

17 I declare under penalty of perjury according to the laws of the State of California, that the
18 foregoing is true and correct.

19 Executed March 4, 2010 at Kingsburg, California.
20

21 Declarant:

22 
23 _____
24 Lindsay Weidner
25
26
27
28
29

1 MARK D. MILLER CA Bar No. 116349
JEREMY D. CLAR CA Bar No. 234238
2 KIMBLE, MacMICHAEL & UPTON
A Professional Corporation
3 5260 North Palm, Suite 221
Post Office Box 9489
4 Fresno, California 93792-9489
Telephone: (559) 435-5500
5 Facsimile: (559) 435-1500

6 Attorneys for Petitioner,
DEMETRIO PAPAGNI
7

8 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
9 TRADEMARK TRIAL AND APPEAL BOARD
10

11 DEMETRIO PAPAGNI, an individual,)
12)
Petitioner)
13)
v.)
14)
EMPIRE GRAPE COMPANY, LLC,)
a California Limited Liability Company,)
15)
Respondent.)
16)
17)

Cancellation No. 92051679

In the matter of Registration No. **3,679,176**
For the mark **FU JIN**

**DECLARATION OF MARK D. MILLER
IN SUPPORT OF PETITIONER'S
MOTION FOR SUMMARY JUDGMENT**

18
19 I, Mark D. Miller, declare:

20 1. I am an attorney at law duly licensed to practice before all of the courts of the state of
21 California and registered to practice before the United States Patent and Trademark Office. I am a
22 member of the law firm of Kimble, MacMichael & Upton, attorneys for Petitioner Demetrio
23 Papagni. The matters set forth below are of my own personal knowledge and if called as a witness
24 I would and could competently testify thereto.

25 2. At the request of Demetrio Papagni, on March 20, 2009, I prepared and submitted
26 an intent-to-use trademark application for the mark "FU JIN" for use on wine, which resulted in
27 United States Trademark Application No. 77/696,075. A true and correct copy of an electronic
28 printout of the application from the Trademark Document Retrieval ("TDR") service available

1 on the United States Patent and Trademark Office website is attached hereto as exhibit A and
2 incorporated herein by this reference.

3 3. On November 18, 2009, our office received a Notice of Suspension with regard to
4 United States Trademark Application No. 77/696,075. According to the Notice of Suspension,
5 the prosecution of Application No. 77/696,075 was suspended pending the outcome of the
6 present Cancellation Proceeding No. 92051679 involving United States Trademark Application
7 Serial No. 77/666,862 (Reg. No. 3,679,176). A true and correct copy of an electronic printout of
8 the Notice of Suspension from the Trademark Document Retrieval ("TDR") service available on
9 the United States Patent and Trademark Office website is attached hereto as exhibit B and
10 incorporated herein by this reference.

11 I declare under penalty of perjury under the laws of the United States of America that the
12 foregoing is true and correct of my own personal knowledge, except as to those matters stated on
13 information and belief, and as to those matters I believe it to be true; and that this declaration
14 was executed in Fresno, California on April 6, 2010.

15 

16 _____
MARK D. MILLER

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Empire Grape Company, LLC
Attn: Peterangelo Vallis
2549 W. Paul Ave.
Fresno, California 93711


Deniece Turner

1074401.00140339.000

Exhibit “A”

Document Description: TEAS Plus New Application

Mail / Create Date: 20-Mar-2009

[Previous Page](#)[Next Page](#)

You are currently on page 1 of 3



PTO Form 1478 (Rev 9/2006)

OMB No. 0651-0009 (Exp 12/31/2008)

Trademark/Service Mark Application, Principal Register

TEAS Plus Application

Serial Number: 77696075

Filing Date: 03/20/2009

*NOTE: Data fields with the * are mandatory under TEAS Plus. The wording "(if applicable)" appears where the field is only mandatory under the facts of the particular application.*

The table below presents the data as entered.

Input Field	Entered
TEAS Plus	YES
MARK INFORMATION	
*MARK	FU JIN
*STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	FU JIN
*MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
REGISTER	Principal
APPLICANT INFORMATION	
*OWNER OF MARK	Demetrio Papagni
*STREET	9505 Road 30 1/2
*CITY	Madera
*STATE (Required for U.S. applicants)	California

*COUNTRY	United States
*ZIP/POSTAL CODE (Required for U.S. applicants only)	93636
LEGAL ENTITY INFORMATION	
*TYPE	INDIVIDUAL
* COUNTRY OF CITIZENSHIP	United States
GOODS AND/OR SERVICES AND BASIS INFORMATION	
*INTERNATIONAL CLASS	033
IDENTIFICATION	Wine
*FILING BASIS	SECTION 1(b)
ADDITIONAL STATEMENTS INFORMATION	
*TRANSLATION (if applicable)	
*TRANSLITERATION (if applicable)	
*CLAIMED PRIOR REGISTRATION (if applicable)	
*CONSENT (NAME/LIKENESS) (if applicable)	
*CONCURRENT USE CLAIM (if applicable)	
ATTORNEY INFORMATION	
NAME	Mark D. Miller
ATTORNEY DOCKET NUMBER	10744.00
FIRM NAME	Kimble, MacMichael & Upton
STREET	5260 N. Palm Ave., Ste. 221
CITY	Fresno
STATE	California
COUNTRY	United States
ZIP/POSTAL CODE	93704
PHONE	(559) 435-5500
FAX	(559) 435-1500
EMAIL ADDRESS	ipmail@kmulaw.com

AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
CORRESPONDENCE INFORMATION	
*NAME	Mark D. Miller
FIRM NAME	Kimble, MacMichael & Upton
*STREET	5260 N. Palm Ave., Ste. 221
*CITY	Fresno
*STATE (Required for U.S. applicants)	California
*COUNTRY	United States
*ZIP/POSTAL CODE	93704
PHONE	(559) 435-5500
FAX	(559) 435-1500
*EMAIL ADDRESS	ipmail@kmulaw.com
*AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	275
*TOTAL FEE PAID	275
SIGNATURE INFORMATION	
ORIGINAL PDF FILE	<u>hw_21617114498-174733370_app.FU.JIN.signed.pdf</u>
CONVERTED PDF FILE(S) (1 page)	<u>\\TICRS\EXPORT6\IMAGEOUT6\776\960\77696075.xml1\FTK0003.JPG</u>
* SIGNATORY'S NAME	Demetrio Papagni
* SIGNATORY'S POSITION	Owner

PTO Form 1478 (Rev 9/2006)

OMB No. 0651-0009 (Exp 12/31/2008)

Trademark/Service Mark Application, Principal Register**TEAS Plus Application****Serial Number: 77696075****Filing Date: 03/20/2009****To the Commissioner for Trademarks:****MARK:** FU JIN (Standard Characters, see mark)

The literal element of the mark consists of FU JIN.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Demetrio Papagni, a citizen of United States, having an address of

9505 Road 30 1/2

Madera, California 93636

United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

For specific filing basis information for each item, you must view the display within the Input Table.

International Class 033: Wine

Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).

The applicant hereby appoints Mark D. Miller of Kimble, MacMichael & Upton

5260 N. Palm Ave., Ste. 221

Fresno, California 93704

United States

to submit this application on behalf of the applicant. The attorney docket/reference number is 10744.00.

The docket/reference number is 10744.00.

Correspondence Information: Mark D. Miller

5260 N. Palm Ave., Ste. 221

Fresno, California 93704

(559) 435-5500(phone)

(559) 435-1500(fax)

ipmail@kmulaw.com (authorized)

A fee payment in the amount of \$275 has been submitted with the application, representing payment for 1 class(es).

Declaration

Original PDF file:

hw 21617114498-174733370 . app.FU.JIN.signed.pdf

Converted PDF file(s) (1 page)**Signature File1**

Signatory's Name: Demetrio Papagni

Signatory's Position: Owner

RAM Sale Number: 4096

RAM Accounting Date: 03/23/2009

Serial Number: 77696075

Internet Transmission Date: Fri Mar 20 17:51:23 EDT 2009

TEAS Stamp: USPTO/FTK-216.171.144.98-200903201751237

06538-77696075-400bbde8e401352307075bfc3

c614a7f7d8-DA-4096-20090320174733370659

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NOTE: Within any e-mail, please include your telephone number so we can talk to you directly, if necessary. Also, include the relevant serial number or registration number, if existing.

Exhibit “B”

Document Description: **Suspension Letter**Mail / Create Date: **18-Nov-2009**[Previous Page](#)[Next Page](#)You are currently on page **1** of **2**

To: Demetrio Papagni (ipmail@kmulaw.com)
Subject: U.S. TRADEMARK APPLICATION NO. 77696075 - FU JIN - 10744.00
Sent: 11/18/2009 12:40:48 PM
Sent As: ECOM106@USPTO.GOV
Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE**SERIAL NO:** 77/696075**MARK:** FU JIN***77696075*****CORRESPONDENT ADDRESS:**

MARK D. MILLER
KIMBLE, MACMICHAEL & UPTON
5260 N PALM AVE STE 221
FRESNO, CA 93704-2210

GENERAL TRADEMARK INFORMATION:
<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: Demetrio Papagni

**CORRESPONDENT'S
REFERENCE/DOCKET NO:**
10744.00

CORRESPONDENT E-MAIL ADDRESS:
ipmail@kmulaw.com

NOTICE OF SUSPENSION**ISSUE/MAILING DATE:** 11/18/2009

SUSPENSION PROCEDURE: This suspension notice serves to suspend action on the application for the reason(s) specified below. No response is needed. However, if you wish to respond to this notice, you should use the "Response to Letter of Suspension" form found at <http://teasroa.uspto.gov/rsi/rsi>. The Office will conduct periodic status checks to determine if suspension remains appropriate.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), based on the cited registration(s). However, registration maintenance documents are due to be filed for the cited registration(s). If these registration maintenance documents are not timely filed, the cited registration(s) will be canceled under §8 or expire under §9 and will no longer present a bar to registration under Section 2(d). 15 U.S.C. §§1058, 1059. Therefore, action on this application is suspended for 6 months until the examining attorney can determine whether the cited registration(s) will be canceled under §8 or expire under §9. 37 C.F.R. §2.67; TMEP §716.02(e).

/Sally Shih/
Sally Shih
Trademark Examining Attorney
Law Office 106
USPTO
(tel) 571-272-9712
(fax) 571-273-9106

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

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- **Technical help:** For instructions on how to use TDR, or help in resolving **technical** glitches, please e-mail TDR@uspto.gov. If outside of the normal business hours of the USPTO, please e-mail [Electronic Business Support](#), or call 1-800-786-9199.
- **Questions about USPTO programs:** Please e-mail [USPTO Contact Center \(UCC\)](#).

NOTE: Within any e-mail, please include your telephone number so we can talk to you directly, if necessary. Also, include the relevant serial number or registration number, if existing.